

DOCUMENT RESUME

ED 277 285

HE 019 421

AUTHOR Steinbach, Sheldon Elliot
TITLE AIDS on Campus: Emerging Issues for College and University Administrators.
INSTITUTION American Council on Education, Washington, D.C.
PUB DATE Dec 85
NOTE 21p.
AVAILABLE FROM American Council on Education, One Dupont Circle, Suite 800, Washington, DC 20036-1193.
PUB TYPE Guides - Non-Classroom Use (055) -- Viewpoints (120)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS College Administration; *College Students; *Court Litigation; Decision Making; Disease Control; *Diseases; Federal Legislation; *Health Education; Higher Education; Information Sources; *Legal Responsibility; Patient Education; Policy Formation; *School Personnel
IDENTIFIERS *Acquired Immune Deficiency Syndrome

ABSTRACT

Legal information concerning Acquired Immune Deficiency Syndrome (AIDS) that college presidents may find helpful in establishing policies and procedures is provided in a paper by the general counsel of the American Council on Education. Sources of medical information, including the American College Health Association, hotlines, and federal publications, are also identified. Three procedural suggestions for developing a campus response to AIDS are considered: designating a high-level campus committee, developing a campus-wide educational program on AIDS, and creating a flexible policy for the college. The paper focuses on potential issues posed by students or employees who have, or are thought to have, AIDS or AIDS-Related Complex. Many of the same issues are posed by students/employees whose blood contains antibodies to the AIDS virus. While mandatory testing for the AIDS antibody is not recommended, the following steps are suggested: regular monitoring of the victim's medical condition, counseling the victim on the disease and its transmission, and insulating other persons on campus from close contacts with the victim (e.g., sharing a room, serving food). Attention is directed to considerations from the standpoints of potential tort liability and laws protecting students (e.g., the Rehabilitation Act of 1973). (SW)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

AMERICAN COUNCIL ON EDUCATION

"PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

Mellon
Steinbach

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC):"

AIDS ON CAMPUS

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☒ This document has been reproduced as
received from the person or organization
originating it.

☐ Minor changes have been made to improve
reproduction quality.

• Points of view or opinions stated in this docu-
ment do not necessarily represent official
OERI position or policy.

Introduction

Increasing public awareness and concern over Acquired Immune Deficiency Syndrome (AIDS) has prompted the American Council on Education in cooperation with the American College Health Association to disseminate the enclosed materials. The ACE paper, AIDS on Campus: Emerging Issues for College and University Administrators, presents the most current information available on the legal issues regarding AIDS on campus.

The American College Health Association (ACHA) Task Force on AIDS has prepared a brochure entitled, "AIDS: What Everyone Should Know." The ACHA's General Institutional Response to AIDS is also very helpful. These materials are available from ACHA at:

American College Health Association
15879 Crabbs Branch Way
Rockville, Maryland 20855
(301)963-1100

Two pieces of information providing additional information on AIDS are obtainable from the federal government. One is a statement by Dr. James O. Mason, Acting Assistant Secretary for Health of the Department of Health and Human Services, and the other is the November 1985 AIDS Information Bulletin, The Public Health Service Response to AIDS.

Procedural Suggestions for Developing a Campus Response to AIDS

● DESIGNATE A HIGH LEVEL CAMPUS COMMITTEE

Whether or not incidents involving AIDS have occurred on your particular campus, it is very important to have a knowledgeable group of high level people or, at a minimum, a specifically designated individual in charge of a deliberately planned campus program on AIDS. This person or committee should be charged with the responsibility of becoming educated on the medical, legal, personal/community, and ethical/moral issues associated with this disease. Knowledge is a powerful tool in handling actual problems that may arise, dispelling misinformation which may cause appreciable anxiety, and helping to prevent the spread of the disease. Education is currently considered by public health officials as well as the ACHA as the best method of preventing the spread of AIDS.

Many college health and student affairs personnel have already been charged with the responsibility for program development on many campuses. Professionals in these areas have knowledge and expertise that can be immediately helpful in initiating the campus response to AIDS. It is also very important to have the involvement of all other sectors of the campus community. The counseling services and public affairs offices are especially crucial to the development of good institutional committees. Students, faculty and administrators should be represented on the committee and involved thoroughly in the process. The governing board of the institution needs to be included. New information is available daily on AIDS. At least one person must be current at all times and keep the committee and the campus as informed as possible. Two hot lines providing information include: The U.S. Public Health Service: 1-800-447-AIDS (in Atlanta, 404-329-1295) and the National Gay Task Force, 1-800-221-7044.

● DEVELOP A CAMPUS-WIDE EDUCATIONAL PROGRAM ON AIDS

Many campuses have already done a great deal to provide current information on the AIDS disease. Campus newspapers have been used effectively to provide initial information, as well as ongoing communications. The American College Health Association brochure is an excellent source of accurate information communicated clearly and sensitively, and it should be widely distributed on campus. Health education programs and human sexuality programs provide appropriate means for education. It is important to note, however, that these programs are often geared to meet the needs of traditional undergraduate students and may not reach faculty, staff, administrators and non-traditional or commuter students who also need information. Special attention may need to be given to providing information to these groups. Governing boards should also be a part of the education process so that they can be knowledgeable and supportive. Some institutions have also made or are planning to use courses, special seminars, publications, and hot lines to disseminate the information and discuss the issues stemming from concerns about AIDS.

Professional personnel in the student and health affairs areas have special need for accurate and current information about AIDS. Thought should be given to holding educational sessions for these people so that they may have the benefit of all current information as well time to talk about their own concerns in dealing with the issues.

The development of programs targeted to populations at high risk in contracting AIDS should receive priority. Those populations are discussed in the enclosed ACHA brochure. Two of these major groups include homosexual and bisexual men with multiple partners, and intravenous drug abusers. It is very important to note that the high incidence of the disease in the United States among homosexual men represents a biological "accident"; in other countries where the disease exists it appears to be spread mostly through heterosexual activity. Providing educational programs for these target populations may not be easy, but should nevertheless be considered a priority. Several campuses in highly populated urban areas have developed such programs and could serve as consultants.

Although very few children have been diagnosed as having AIDS, a great deal of concern has been generated in the school districts that have been affected. It is important that any child care centers, lab schools, or similar programs be given special attention in the development of the institutional program concerning AIDS.

● CREATE A FLEXIBLE POLICY FOR THE INSTITUTION

As will be clear from the American College Health Association brochure and the Council's legal paper, precise direction for a definitive policy that will serve the best interests of all institutions is unlikely. The best statement for now is one that is based on principles of flexibility, sensitivity, simplicity, and concern for individual as well as community welfare. Campuses that have already issued such policy statements primarily have chosen to consider each case of AIDS on a case by case basis, attending to the principles stated above.

College and university public affairs officers always have a difficult role to play when there are delicate and sensitive issues for the institution. It is, therefore, very important that public affairs officers know what to say at all times regarding institutional policy and procedures regarding the handling of AIDS issues and individual cases. The ethical and moral questions of individual and community rights warrant special attention and thoughtful discussion. Direct involvement of the public affairs division of the institution in this process is very important to the communication process on campus and in the larger community.

In developing a campus-wide program to respond to AIDS, it is important to remember that despite considerable media attention there is still a good deal of misinformation, fear, and prejudice operating in regard to AIDS. Only appropriate, accurate, timely, and sensitive educational programs can combat these problems. The cure for AIDS is not foreseen in the immediate future. This makes it imperative that campus communities join others in trying to prevent the spread of the disease and planning for long-term campus response. Educational programs that reach everyone are the best advice we can offer.

ACE will continue to be supportive to campuses as they respond to the issues raised by AIDS. For additional information, to share policies, or to raise questions not dealt with through national hot lines, please contact Donna Shavlik, Director, Office of Women in Higher Education, (202-939-9390).

AMERICAN COUNCIL ON EDUCATION

Division of Governmental Relations

AIDS ON CAMPUS:

Emerging Issues for College and University Administrators

Sheldon Elliot Steinbach
General Counsel
American Council on Education

(The author wishes to acknowledge the extensive direction and assistance of Eugene D. Gulland of the law firm of Covington & Burling in the preparation of this document.)

This paper explores various questions for colleges and universities posed by AIDS, Acquired Immunodeficiency Syndrome. Any analysis of the subject is necessarily preliminary because medical understanding of this new disorder -- and the responses of courts and legislatures -- is itself in the most formative stages.

The AIDS epidemic presents a serious public health issue, despite AIDS' relatively low incidence in the general population, because there is no known medical means of prevention or treatment. The disease appears to be invariably fatal. The Center for Disease Control ("CDC") reports that currently there are more than 14,000 documented cases within the United States.

We focus here on potential issues posed by students or employees who have, or are thought to have, AIDS or AIDS-Related Complex ("ARC").^{1/} Many of the same issues are posed by students or employees whose blood contains antibodies to the AIDS virus (HTLV III/LAV), because medical experts currently believe that all

^{1/} ARC is characterized by a positive blood test for the HTLV III/LAV virus antibody and by such symptoms as general fatigue, swollen lymph nodes, etc. It appears that ARC sometimes (about 20 percent so far) develops into AIDS, but the frequency of this progression is unknown. Certainly any diagnosis should be made by qualified medical professionals.

All persons whose blood possesses antibodies to the HTLV III/LAV virus are thought to be at some risk of developing AIDS or ARC, but present estimates place the percentage of ultimate AIDS cases among this population in a range of 5-20 percent. Such estimates are necessarily tentative because the incubation period for AIDS may be longer for many individuals than the 3-5 years currently accepted by medical authorities and because the period of observation has thus far been short.

such persons are carriers who can transmit the virus to others even though they are otherwise free from the symptoms of AIDS or ARC. We do not address the special questions raised by university employees and students receiving or providing health care services.

Our conclusions are as lacking in finality as is knowledge of the disease. The consensus of authoritative medical opinion, as reflected by the recent recommendations of the CDC and Public Health Service ("PHS"), is that AIDS is not a readily communicable disease. It appears not to be spread through casual contact, but requires intimate sexual contact, direct exchange of body fluids, sharing of intravenous injection needles or transfusion of the blood products of an infected individual. There is no basis for concluding at this time that universities or other institutions should adopt mandatory testing of students or employees for the AIDS antibody.

We believe it is unlikely that a school, acting conscientiously on the basis of the best currently available medical information about AIDS, would be held liable simply because one student or employee transmitted the disease to another. Nonetheless, a school which learns that a student or employee has AIDS, ARC or AIDS virus antibodies may wish to take special steps, including: (1) regular monitoring of the victim's medical condition; (2) counselling the victim on the nature of the disease and against engaging in conduct that could transmit it to others; and

(3) where professional medical opinion considering the particular victim's case so indicates, insulating other members of the university community in their close contacts with the victim (e.g., sharing a room, serving food, participating in the same contact sports).

There is no basis for concluding at the present time that schools should routinely exclude or dismiss students or employees simply because they have AIDS, ARC or virus antibodies; but schools accommodating such persons should make their policy known to the university community. Schools may wish to require students having AIDS, ARC or AIDS virus antibodies to inform others (such as dormitory roommates) of the students' condition before authorizing unusually close university-sponsored contact with those persons. If a school becomes aware that a student or employee is engaging in conduct that threatens the transmission of AIDS to others in the community, it should consult promptly with medical and legal counsel about the advisability of taking action to protect against the spread of the disease.

Schools may also wish to consider public health informational programs about AIDS, which would seek to educate the academic community about the disease, its symptoms, known means of transmission and precautions for avoiding or reducing the risks of contracting it. Such programs represent a sensible response to a public health problem that can most effectively be addressed at this time by encouraging informed and responsible

individual conduct. Schools providing such programs should make sure that they remain aware of the most current available knowledge about AIDS so that the information they are disseminating is not inaccurate or incomplete.

Colleges and universities contemplating stronger steps, such as excluding (or dismissing) students or employees who may have AIDS or requiring testing, may wish to obtain legal advice. Such policies raise questions under both federal and state law (including the Federal Rehabilitation Act of 1973). Schools will generally be on firmer legal ground if they make decisions on a case-by-case basis with the support of professional medical judgment.

A. Considerations from the Standpoint
of Potential Tort Liability.

Colleges and universities are obliged to exercise reasonable care in protecting "invitees" (students, faculty, administrators, etc.) on the premises from known or reasonably foreseeable danger.^{1/} The school's duty is not that of an "insurer";^{2/} however, a duty to protect students and other invitees from unreasonable risks of contracting AIDS could be founded on the responsibility of the college as proprietor. See Restatement

^{1/} See, e.g., Korenak v. Curative Workshop Adult Rehab. Center, 237 N.W.2d 43, 36 (Wisc. 1976); Duarte v. State, 143 Cal. Rptr. 804, 808-10 (Cal. App. 1978).

^{2/} See, e.g., Baum v. Reed College, 401 P.2d 294 (Ore. 1965).

(2d) of Torts, §§ 314A(3) and 315 (1965). Such a duty is consistent with precedents imposing liability upon landlords, innkeepers, and employers who exposed invitees or servants to infectious diseases. See Earle v. Kuklo, 98 A.2d 107 (N.H. App. Div. 1953); Kleigel v. Aitken, 69 N.W. 67 (Wisc. 1896); Gilbert v. Hoffman, 23 N.W. 632 (Iowa 1885). Each of these decisions involved highly contagious diseases, such as tuberculosis or smallpox, which the property owners knew or should have known could be easily transmitted. Under such circumstances, the courts held that the owner had an obligation to warn those invited onto the premises.

The current, authoritative medical consensus is that AIDS is not highly contagious. The recent recommendations of the CDC and PHS are highly significant in this regard.^{1/} The CDC concluded that "casual person-to-person contact as would occur among school children appears to pose no risk." CDC Report, p. 519. College officials could reasonably conclude on this basis -- particularly after confirmatory consultation with medical professionals knowledgeable about AIDS -- that routine segregation or exclusion of college-age AIDS victims or general disclosure of

1/ See "Education and Foster Care of Children with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus," 34 Morbidity and Mortality Weekly Report, 517-21 (August 30, 1985) ("CDC Report"); "Recommendations for Preventing Transmission of Infection With Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus in the Workplace," 34 Morbidity and Mortality Weekly Report 682 (Nov. 15, 1985) ("PHS Report").

their identity to faculty and other students is unwarranted.^{1/} Similarly, the PHS Report stresses that the risks of AIDS do not justify mandatory testing of employees for AIDS virus or dismissal of AIDS victims even in occupations (such as food service) involving close contact with others.^{2/} That professional opinion on the question is not unanimous, or that medical knowledge is not certain, should not require precautions going far beyond what most knowledgeable experts regard as appropriate.

The CDC and PHS recommendations furnish a potential standard of reasonable care that courts should consider if a student or employee who contracts AIDS seeks to hold a college liable.^{3/} The CDC and PHS guidelines provide a basis for arguing that transmission through routine personal interaction is not reasonably foreseeable and that any transmission is probably the

1/ Indeed, in light of the CDC Report, such actions could expose colleges to litigation, as discussed infra. See New York State Ass'n. for Retarded Children v. Carey, 612 F.2d 644, 649-50 (2d Cir. 1979). In addition, the CDC guidelines note the possibility of liability for invasion of privacy being imposed if colleges were to publicize a student's carrier status. See CDC Report, p. 520.

2/ The PHS Report notes, however, that personal service workers or food service workers should not have physical contact with others or prepare or serve food if they have open lesions, "weeping dermatitis," or injuries to their hands.

3/ Extensive hearings are being conducted in cases recently brought by local school districts in New York, challenging the decision of the city's Board of Education to admit elementary school-age children suffering from AIDS. The decision in that case could set an influential precedent on the weight to be given the CDC guidelines, since the Board's decision relied heavily on the CDC Report.

result of private individual conduct for which the college should not be held responsible. See Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. App. 1981); Hegel v. Langsam, 273 N.E. 2d 351 (D.C. Ohio 1971).

The CDC and PHS guidelines should not be viewed as a prescription for doing nothing, however. The CDC expressly recommends that grade schools make an individualized determination regarding the appropriate educational setting for each infected student, based on consultation with medical and school personnel as well as the student's parents or guardian. The CDC also recognizes the possibility that AIDS could be spread by bites, fluids from open lesions, and direct contact with body wastes. CDC Report at 519. In each case, risks and benefits to both the AIDS victim and other students are to be weighed. Id. In addition, CDC recommends regular reevaluations. Id. at 520. CDC also suggests that sufficient numbers of school personnel be aware of an infected child's condition to ensure prompt detection of situations where the potential for transmission may increase (e.g., open sores, bleeding injury, biting behavior). Id. at 519-20.

Similarly, the PHS Report stresses that routine and continuing contact among employees and the public is not an indicated means of transmitting AIDS, even with respect to food service or personal service workers (e.g., barbers, manicurists,

etc.). PHS nevertheless recommends certain precautions that should be followed.^{1/}

Accordingly, if a school becomes aware that a student or employee is infected with AIDS, ARC or possesses AIDS antibodies, it should consider the desirability of regularly monitoring the person's medical condition. It may wish to counsel the person about AIDS, appropriate hygiene, and the importance of not engaging in acts that are known to be likely means of transmitting the virus to others. The school may reasonably require the student or employee to submit to monitoring and counselling as a condition of continued attendance or employment. And the school should seek the guidance of medical professionals in determining what, if any, steps should be taken to separate the person from particular kinds of contact with other members of the academic community. A medical professional may conclude that some medical indications (e.g., open lesions, the victim's own vulnerability

1/ The PHS Report points out that AIDS could be transmitted if blood or other fluids from the body of an infected personal service worker somehow enter another through a break in the skin or other "portal of entry." Page 693. The Report also recommends that personal service workers and food service workers not have "direct" contact with others, or prepare or serve food, if they have open, oozing lesions, "weeping dermatitis," or injuries to their hands. Id. Otherwise, PHS stresses that AIDS is not transmitted by casual contact and that employees with AIDS "should not be restricted from using telephones, office equipment, toilets, showers, eating facilities and water fountains." Id. at 694. PHS does recommend that any objects contaminated with the blood or other body fluids of any worker -- including those who test positive for the AIDS virus antibody -- promptly be cleaned with soap or a detergent and then disinfected. Id.

to infection) may warrant special measures for one victim, while the condition of other victims may not call for similar steps.

Schools should also consider making known their policy toward AIDS to the academic community, which would foreclose any charges that potential risks had been unreasonably "concealed." Schools considering any action that would disclose the identity of (or confidential information about) AIDS victims should only proceed with the advice of counsel, because of the strong possibility of litigation.^{1/} On the other hand, a school may wish to require victims to disclose their medical condition to others with whom they are to have especially close contact (e.g., dormitory roommates) before permitting university-sponsored contact to take place. All decisions of this sort should be made with the benefit of professional medical advice.

Schools may also wish to undertake public health informational programs designed to acquaint members of the academic community with up-to-date information about the manner in which AIDS is transmitted and means of avoiding or minimizing the risks of contracting it. This represents a sensible response to what is in many respects a classic public health problem: the disease

^{1/} Schools should not disclose medical information (or records) of AIDS victims without first satisfying themselves that their actions are consistent with applicable laws protecting the confidentiality of the records and the privacy of the individual. Schools should also be mindful of the potential applicability of the Buckley Amendment (20 U.S.C. § 1232g) and Education Department regulations to disclosures of student records without the student's consent (or consent of parents for students under 18 years of age).

appears to be spread chiefly by intimate contact or intravenous drug abuse; there are many unidentified, asymptomatic carriers who can transmit the disease; and informed, responsible individual conduct represents the best weapon against further spread of AIDS. So long as schools make sure that information campaigns take full account of the most current and accurate information about AIDS -- and do not raise questions under other applicable laws^{1/} -- such programs should contribute both to reducing the spread of AIDS and to demonstrating schools' efforts to exercise reasonable care in protecting the academic community from the disease.

Finally, situations may arise that will force colleges and universities to make decisions requiring a particularly difficult balancing of competing rights and responsibilities. For example, a school may face the need to consider suspending, expelling or otherwise disciplining an AIDS victim who fails to heed counselling and engages in conduct known likely to infect others;

^{1/} Many AIDS counselling and informational programs (sponsored to date by organizations other than colleges and universities) provide information on such matters as "safe sex" practices involving methods of reducing risks or exposure short of sexual abstinence. Questions could be raised in some jurisdictions whether such counselling and informational programs promote or advocate "immoral" conduct contrary to statutes prohibiting sodomy or other sexual practices. (The question may be of particular concern if the Supreme Court upholds such statutes against constitutional challenge in the pending case of *Bowers v. Hardwick*, No. 85-140 (cert. granted, Nov. 4, 1985).) Schools should seek legal counsel if they intend to provide such counselling in jurisdictions where there is any reasonable likelihood of legal complications along these lines.

or it may have to decide whether to disclose to others that they have been exposed to AIDS virus through contacts with a person known to be infected. See Tarasoff v. Board of Regents, supra. In circumstances such as this, a college or university will need to decide its course of action promptly, and should do so with the benefit of professional legal and medical advice. Cases such as Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979), cert. denied, 446 U.S. 909 (1980), stand as important precedents protecting colleges from imposition of unrealistic duties to supervise their students, but there can be no assurance that all courts will adopt the same standards.^{1/}

B. Considerations From the Standpoint
of the Rehabilitation Act of 1973
And Other Laws Protecting Students.

Some colleges and universities may be considering a more actively precautionary policy against AIDS, including the exclusion of persons having the disease or virus antibodies, and perhaps even the routine testing of students and employees.

^{1/} Cf. Stockwell v. Board of Trustees, 148 P.2d 405 (Cal. 1944) (school's duty to police recurrent use of BB guns on campus); Eiseman v. State of New York, No. 60491 (N.Y. Ct. of Claims, decided March 21, 1983), aff'd, No. 375/85 (App. Div. 4th Dept., June 4, 1985) (murdered student was an "inexperienced adult" to whom university owed a duty of protection against meeting and consorting with dangerous companions); Tarasoff v. Regents of the University of California, supra. Cases holding that a college cannot and should not be required to police the private conduct of its students may not be regarded as establishing the limits of a college's duties where it has notice that an infected student may be failing to exercise due care in contacts with others.

These actions go well beyond the precautions recommended by the CDC and PHS Reports. The first order of business for any school weighing such action is to assess whether there is any applicable state law or judicial decisions.^{1/}

Schools will also need to consider the potential applicability of Sections 503-504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 793-794, which prohibit discrimination against "qualified handicapped individual[s]" in programs or activities conducted with federal financial assistance.^{2/} This issue is presented by at least one of the growing number of AIDS cases in litigation.^{3/} The strong weight of authority holds that individuals alleging unreasonable discrimination under the law have a private right of action. See Kling v. County of Los Angeles, 633

1/ California, for example, has enacted legislation forbidding discrimination in such matters as employment and insurance coverage on the basis of a positive blood test for the AIDS virus antibody. See Cal. Health and Safety Code § 199.21(f). This law reflects in part a response to the fact that there are many "false positive" responses to the commonly used ELISA blood test, and the desire not to discourage persons from having their blood tested.

2/ Section 503 prohibits employment discrimination against "qualified handicapped individuals" in activities conducted under federal contracts; Section 504 forbids discrimination against "qualified handicapped individuals" in connection with any "program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency or by the United States Postal Service." Judicial decisions hold that Section 504 also reaches employment discrimination.

3/ This is the widely-publicized case in which a public secondary school in Kokomo, Indiana, excluded a 13-year-old hemophiliac AIDS victim from attending school. Ryan White v. Western School Corp., No. 85-1192-C (S.D. Ind.).

F.2d 879 (9th Cir. 1980); Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1377 n.1 (11th Cir. 1982), cert. denied, 104 S.Ct. 1591 (1984).

A detailed analysis of Sections 503-504 is beyond the scope of this memorandum. The important point for our purposes is that both the statute (Section 7(7), 29 U.S.C. § 706(7)) and implementing regulations (see 45 C.F.R. § 84(j)(2)) define "handicap" and "handicapped individual" most broadly. In a very recent case, the Eleventh Circuit -- reversing the district court -- held that protected "handicapped individual[s]" include those suffering from chronic contagious diseases such as tuberculosis. Arline v. School Board of Nassau County, No. 84-3307 (decided Sept. 30, 1985).

Arline follows the Second Circuit's decision in New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650 (1979), which is especially relevant to issues presented by AIDS. In Carey, school officials isolated retarded children who were carriers of Hepatitis B virus, which appears to be quite similar to the AIDS virus in the manner of its transmission.^{1/} The court held that the children's isolation violated Section 504 of the Rehabilitation Act because school officials were "unable to demonstrate that the health hazard posed by the hepatitis B

^{1/} The PHS Report describes the similarities between the means of transmission of the Hepatitis B and AIDS viruses, but concludes that the risk of transmitting Hepatitis B significantly exceeds that of AIDS. Page 683.

carrier children was anything more than a remote possibility."
612 F.2d at 650.

This does not mean that schools are invariably forbidden from treating AIDS or ARC victims differently from other students or employees having no communicable disease or other "handicap." The regulations implementing the statute restrict its reach to "situations where the handicapped individual would be 'otherwise qualified' if given 'reasonable accommodation.'" Arline v. School Board, supra, citing 45 C.F.R. §§ 84.3(k)(1) and -84.12, and Southeastern Community College v. Davis, 442 U.S. 397, 410-13 (1979). The court in Arline explained that, in the circumstances of potentially contagious tuberculosis, the school was required at a minimum to make a "well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives" and could not rely on "reflexive reactions grounded in ignorance or capitulation to public prejudice." Id., citing Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983); New York State Ass'n of Retarded Children v. Carey, supra.

These cases, in essence, point to the same virtues of conscientious decisions based upon professional medical judgments about an individual AIDS victim's specific circumstances that are suggested in Section A of this memorandum. Arline, Carey and the Department of Health and Human Resources' regulations suggest also that a school should weigh the possible steps, short of dismissal or exclusion of AIDS victims, that would reasonably

balance their individual interests against concern for the welfare of the academic community.^{1/}

This is not to say that courts will require colleges and universities to uniformly and invariably make such "accommodation" to students having AIDS, ARC or AIDS virus antibodies. Conscientious weighing of the benefits and risks in particular circumstances may, in the view of courts, warrant exclusion or dismissal of students because of the uncertainties surrounding AIDS and the seriousness of the disease. Some reputable medical experts have called for a more vigorous public health response to AIDS than government has mustered so far, including mandatory testing before issuance of marriage licenses and strict controls on the conduct of AIDS victims who continue to be sexually

^{1/} DHHS regulations for handicapped students suggest "reasonable accommodations" such as extending the time permitted for completion of degree requirements; devising methods of examination that measure a student's achievement while minimizing the degree to which the handicaps hinder performance on traditional examinations; providing auxiliary aids such as taped texts and interpreters; and offering accessible housing at the same cost as shelter available to other students. 45 C.F.R. § 84.31. Schools that accept and follow the CDC and PHS recommendations would rarely find it necessary to provide "accommodations" in the form of isolating students or employees from contact with others.

The concept of accommodation is not, however, limitless. Institutions are not required to engage in substantial modifications which they reasonably conclude would cause undue hardship or which would inherently compromise the essential educational requirements of a particular program. See Southeastern Community College v. Davis, 442 U.S. 397 (1978); note, Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern, 80 Colum. L. Rev. 171 (1980).

active.^{1/} The CDC and PHS Reports make it likely, however, that courts in Rehabilitation Act cases will be skeptical of responses to AIDS that seem significantly more drastic than what CDC and PHS are recommending. Schools considering stricter responses should have the support of qualified medical opinion. The important point is that any response should be a carefully considered one, taking account of informed medical and legal advice, rather than a "reflexive reaction" of prejudice against -- or sympathy for -- AIDS victims.

CONCLUSION

It is understandable that society expects its colleges and universities to be more deliberate, thoughtful and dispassionate than most institutions in making important decisions. The AIDS crisis demands that institutions of higher education make critical and conscientious decisions based on the best information and professional judgments available. If a school does this on a case-by-case basis and remains open to reexamination of the issues as more becomes known about AIDS, it will be in the best position to comply with the sometimes-conflicting requirements of the law.

^{1/} Recent press reports describe a kind of "compromise" policy adopted by the military: all service personnel and new applicants will be tested for AIDS; applicants who test and retest "positive" will be excluded from the service; current service personnel who test and retest "positive" will be assigned to special duties where risks to themselves and others will presumably be minimized.